

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2090

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH MARCERA, and JOHN DILLMAN,
Individually and on behalf of all
others similarly situated,

Plaintiffs-Appellants

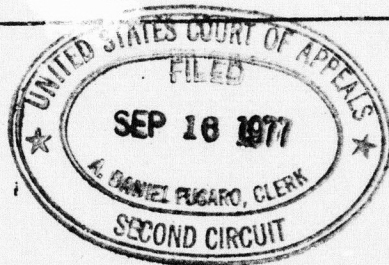
-vs-

STEPHEN CHINLUND, JOSEPH WASSER,
and DOROTHY WADSWORTH, Individually
and in their official capacities as
members of the New York State
Commission of Correction, and
WILLIAM LOMBARD, Individually and in
his official capacity as Sheriff of
Monroe County and on behalf of all
other persons similarly situated,

Defendants-Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF



MONROE COUNTY LEGAL ASSISTANCE CORPORATION
DAVID W. BEIER III, OF COUNSEL
DAAN BRAVEMAN, ESQ., OF COUNSEL
Attorney for Plaintiffs/Appellants
80 West Main Street
Rochester, New York 14614
Tel. No. (716) 325-2520

LOUIS J. LEFKOWITZ, ESQ.
Attorney General State of New York
PAUL O. HARRISON, OF COUNSEL
300 Terminal Building
65 Broad Street
Rochester, New York 14614
Tel. No. (716) 454-4540

JOHN D. DOYLE, ESQ.
307 County Office Building
Rochester, New York 14614
Tel. No. (716) 428-5280

Attorneys for Defendants'-Appellees

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P/S

TABLE OF CONTENTS

	Page
QUESTIONS.....	1
INTRODUCTION.....	2
POINT I	
<u>PRELIMINARY RELIEF IS NECESSARY TO PREVENT FURTHER DEPRIVATION OF DETAINEES' CONSTITUTIONAL RIGHT TO RECEIVE CONTACT VISITS FROM FRIENDS AND FAMILY MEMBERS.....</u>	4
A. There is a substantial likelihood that plaintiffs will succeed on the merits of their claim.....	6
B. Plaintiffs and other pre-trial detainees will continue to be subjected to irreparable injury.....	11
POINT II	
<u>DISPUTED FACTUAL ISSUES RAISED ON A PRELIMINARY INJUNCTION MOTION SHOULD NOT BE RESOLVED WITHOUT THE HOLDING OF A FACT FINDING HEARING</u>	
A. Preliminary Injunction.....	15
POINT III	
<u>CERTIFICATION OF A DEFENDANT CLASS IS NECESSARY AND PROPER FOR EFFICIENT RESOLUTION OF THIS ACTION.....</u>	20
POINT IV	
<u>THIS COURT HAS JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER DENYING CLASS CERTIFICATION WITH PRELIMINARY RELIEF</u>	
A. Appealability under 28 U.S.C. §1292(a)(1).....	31
B. Since this court has jurisdiction to review a denial of preliminary relief it may also review the district courts class order.....	35
CONCLUSION.....	37

Table of Cases:

	<u>Cited at Page(s)</u>
<u>Ambrose v. Malcolm</u> , ___ F. Supp. ___ (S.D.N.Y. 1976) (76 Civ. 190)	7,8,26
<u>Ananiz v. California Processors Inc.</u> , 73 F.R.D. 269 (N.D. Calif. 1976)	20
<u>Autry v. Miller</u> , 420 F. Supp. 967 (E.D.N.C. 1976)	20
<u>Brunson v. Board of Trustees of School District No. 1 of Clarendan County South Carolina</u> , 311 F.2d 107 (4th Cir. 1962) cert. denied, 373 U.S. 933 (1963)	32
<u>B.U.I.L.D. of Buffalo v. Sedita</u> , 411 F.2d 284 (2nd Cir. 1971)	32
<u>City of New York v. International Pipe and Ceramics Corp.</u> , 410 F.2d 295 (2nd Cir. 1969)	35
<u>Cobbledick v. United States</u> , 309 U.S. 323 (1940)	31
<u>Danforth v. Christian</u> , 351 F. Supp. 287 (W.D. Mo. 1972) aff'd 506 F.2d 1115 (8th Cir. 1974)	20
<u>Detainees of the Brooklyn House of Detention v. Malcolm</u> , 520 F.2d 392 (2nd Cir. 1975)	6,18
<u>Detainees of the Brooklyn House of Detention v. Malcolm</u> , 421 F. Supp. 832 (S.D.N.Y. 1976)	7-9,14,26
<u>Doglow v. Anderson</u> , 43 F.R.D. 472 (E.D.N.Y. 1968) rev'd on other grounds, 438 F.2d 825 (2nd Cir. 1970)	23
<u>Dopp v. Franklin National Bank</u> , 461 F.2d 873 (2nd Cir. 1972)	19
<u>Eisen v. Carlisle & Jacquelin (I)</u> , 370 F.2d 119 (2nd Cir. 1966)	31
<u>Eisen v. Carlisle & Jacquelin (II)</u> , 391 F.2d 555 (2nd Cir. 1968)	25
<u>Forts v. Malcolm</u> , 426 F. Supp. 464 (S.D.N.Y. 1977)	6
<u>414 Theater Corp. v. Murphy</u> , 499 F.2d 1155 (2nd Cir. 1974)	5

Cases (continued)

Cited at Page(s)

<u>Genosick v. Richmond Unified School District,</u> 479 F.2d 482 (9th Cir. 1973)	35
<u>Gibbs v. Titelman,</u> 369 F. Supp. 38 (E.D. Pa. 1973) rev'd on other grounds, 502 F.2d 1107 (3rd Cir. 1974), cert. denied 419 U.S. 1039 (1974)	28
<u>Hackett v. General Host Corporation,</u> 455 F.2d 618 (3rd Cir. 1972), cert. denied 407 U.S. 925 (1972)	32
<u>Huff v. N.D. Cass Company,</u> 485 F.2d 710 (5th Cir. 1973) (en banc)	30
<u>Hurwitz v. Directors Guild of America Inc.,</u> 364 F.2d 67 (2nd Cir. 1966) cert. denied 385 U.S. 971 (1967)	35
<u>Inmates of Attica Correctional Facility v.</u> <u>Rockefeller,</u> 453 F.2d 12 (2nd Cir. 1974)	27
<u>Inmates of San Diego County Jail v. Duffy,</u> 528 F.2d 954 (9th Cir. 1975)	33,36
<u>Jenkins v. Blue Cross Mutual Hospital Associa-</u> <u>tion, Inc.,</u> 522 F.2d 1235 (7th Cir. 1975)	35
<u>Jones v. Diamond,</u> 519 F.2d 1090 (5th Cir. 1975)	31
<u>Kidd v. Schmidt,</u> 399 F. Supp. 301 (E.D. Wis. 1975)	20
<u>King v. Carey,</u> 405 F. Supp. 41 (W.D.N.Y. 1975)	23
<u>Koehler v. Ogilive,</u> 53 F.R.D. 98 (N.D. Ill. 1971) aff'd 405 U.S. 906 (1971)	27
<u>Kohn v. Royall, Koegel and Wells,</u> 59 F.R.D. 515 (S.D.N.Y. 1973) appeal dismissed 496 F.2d 1094 (2nd Cir. 1974)	23
<u>Korn v. Franchard Corp.,</u> 443 F.2d 1301 (2nd Cir. 1971)	36
<u>Macklin v. Butler,</u> 553 F.2d 525 (7th Cir. 1977)	16

Cases (continued)

Cited at Page(s):

<u>Manicone v. Cleary</u> , ___ F. Supp. ___ (E.D.N.Y. 1975) (74 Civ. 575)	7,26
<u>New York Pathological and X-Ray Laboratories, Inc. v. Immigration and Naturalization Service</u> , 523 F.2d 79 (2nd Cir. 1975)	4
<u>Omega Importing Corp. v. Petri-Kine Camera Company</u> , 451 F.2d 1190 (2d Cir. 1971)	4
<u>Pennsylvania Assn. of Retarded Children v. Common- wealth of Pa.</u> , 334 F. Supp. 1257 (E.D. Pa. 1972)	20
<u>Price v. Lucky Stores</u> , 501 F.2d 1177 (9th Cir. 1974)	32
<u>Pride v. Community School Board</u> , 482 F.2d 257 (2nd Cir. 1973)	4
<u>Redhail v. Zablocki</u> , 418 F. Supp. 1061 (E.D. Wis. 1976)	20
<u>Rhem v. Malcolm</u> , 371 F. Supp. 594 (S.D.N.Y. 1974) aff'd 507 F.2d 333 (2nd Cir. 1974) (Rhem I)	6,7,11,26
<u>Rhem v. Malcolm</u> , 527 F.2d 1041 (2nd Cir. 1975) (Rhem II)	6-8,11,12,17,26
<u>Rikes v. Coleman</u> , 318 F. Supp. 181 (E.D. Va. 1970)	20
<u>Samuel v. Univ. of Pittsburgh</u> , 54 F.R.D. 435 (W.D. Pa. 1972)	20,23
<u>San Filippo v. United Brotherhood of Carpenters and Joiners of America</u> , 525 F.2d 508 (2nd Cir. 1975)	35
<u>S.E.C. v. Frank</u> , 388 F.2d 486 (2nd Cir. 1968)	15
<u>Sero v. Oswald</u> , 351 F. Supp. 522 (S.D.N.Y. 1972)	23
<u>Siegel v. Realty Equities Corporation of New York</u> , 54 F.R.D. 420 (S.D.N.Y. 1972)	23
<u>Sims v. Greene</u> , 161 F.2d 87 (3rd Cir. 1947)	15

<u>Cases (continued)</u>	<u>Cited at Page(s) :</u>
<u>Sonesta Int'l Hotels Corp. v. Wellington Associates,</u> 483 F.2d 247 (2nd Cir. 1973)	4
<u>Sosna v. Iowa,</u> 419 U.S. 393, 95 Sup. Ct. 553 (1975)	27
<u>Stark v. New York Stock Exchange, Inc.,</u> 466 F.2d 743 (2nd Cir. 1972)	4
<u>Stewart v. Miller,</u> 404 F. Supp. 206 (N.D. Misc. 1975)	
<u>Sullivan v. Title Guarantee,</u> 167 F.2d 393 (2nd Cir. (1948)	35
<u>Thompson v. Board of Education,</u> 71 F.R.D. 398 (W.D. Mich. 1976)	28
<u>Union Pacific R.R. Co. v. Wooddahl,</u> 308 F. Supp. 1002 (N.D. Montana 1970)	23
<u>United States v. Trucking Employers Inc.,</u> 72 F.R.D. 101 (D.D.C. 1976)	28
<u>United States ex rel Walker v. Mancusi,</u> 338 F. Supp. 371 (W.D.N.Y. 1971) aff'd on other grounds 467 F.2d 51 (1972)	
<u>United States ex rel Wolfish v. Levi,</u> 406 F. Supp. 1243 (S.D.N.Y. 1976)	6
<u>United States v. Robin,</u> 553 F.2d 8 (2nd Cir. 1977)	37
<u>Washington v. Lee,</u> 390 U.S. 333 (1968) affirming 263 F. Supp. 327 (M.D. Ala.)	20
<u>Williams v. Wallace Silversmiths, Inc.,</u> ___ F.2d ___ (2nd Cir., March 4, 1977)	33,34
<u>Yaffe v. Powers,</u> 454 F.2d 1362 (1st Cir. 1972)	32
<u>Zwack v. Krans Brothers and Co.,</u> 237 F.2d 255 (2nd Cir. 1956)	35

Statutes and Federal Rules of Civil Procedure:

Cited at Page(s):

28 U.S.C. §1292(a) (1)	31-34
New York Constitution, Article 13, Section 13	24
New York Correction Law §500-c	24
Rule 23	20-30
Rule 59(e)	3,16

Other Authorities:

	<u>Cited at Page(s)</u>
<u>Class Actions</u> , Newberg, H., ed. (1977)	21
<u>Defendant Class Actions</u> , 9 Valparaiso L. Rev. 357 (1975)	21,29
Kaplan, <u>Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)</u> , 81 Harv. L. Rev. 356 (1967)	27

QUESTION I: Whether the District Court erred when it denied preliminary relief to pre-trial detainees who sought to prevent the further deprivation of their constitutional right to receive contact visits?

The District Court answered in the negative.

QUESTION II: Whether disputed factual issues raised in a preliminary injunction motion should have been resolved without a fact finding hearing?

The District Court answered in the affirmative.

QUESTION III: Whether certification of a defendant class is necessary and proper for efficient resolution of this action?

The District Court answered in the negative.

QUESTION IV: Whether this Court has jurisdiction to review the District Court's order denying class certification and preliminary relief?

The lower court did not reach this question.

INTRODUCTION

Plaintiffs, Joseph Marcera and John Dillman, instituted this action for declaratory and injunctive relief restraining defendants from continuing to deny pre-trial detainees the right to receive contact visits while confined in county jails. Final relief was sought against four public officials each of whom has responsibilities for the care and custody of pre-trial detainees in county jails in New York State. The named defendants included William Lombard, Sheriff of Monroe County, individually and as a representative of a defendant class of Sheriffs, and Stephen Chinlund, Joseph Wasser and Dorothy Wadsworth, members of the New York State Commission of Correction.

Plaintiffs moved for preliminary relief and certification of defendant and plaintiff classes [App. 26-27]. Plaintiffs' preliminary injunction motion requested that the District Court direct defendant Lombard and other members of the defendant class of Sheriffs to submit plans for the initiation of contact visitation [App. 36-39]. These plans did not require immediate implementation of contact visitation, but rather merely required the submission of such items as (1) pertinent architectural information; (2) a timetable for implementation; and (3) criteria for designating which pre-trial detainees would receive contact visits.

Despite a request that the District Court hold a hearing if the Court felt there were factual issues in dispute, the District Court denied plaintiff's motion for preliminary relief and

certification of a defendant class.* In so doing, the District Court in rendering its decision made findings of fact regarding alleged differences between the Monroe County Jail and other jails in New York State. These findings were based on unsupported assertions in defendant Lombard's memorandum of law, and were flatly contradicted by affidavits submitted by plaintiffs. [App. 111-113].**

Plaintiffs have appealed the denial by the District Court of their motions for preliminary injunction and certification of a defendant class. Plaintiffs assert that the relief sought should have, under the controlling precedents of this Court, been granted as a matter of law. Alternatively, plaintiffs urge this Court to find that the District Court abused its discretion by failing to hold a hearing on the plaintiffs' motions.

*More than six months passed from the date of the plaintiffs' motion for preliminary relief and the District Court had reached no decision, so plaintiffs petitioned this Court for a mandamus order directing the District Court to decide the motion. One day after the mandamus petition was served, plaintiffs' motions were denied.

**Subsequently, plaintiffs moved pursuant to Federal Rule 59(e) to have the District Court vacate this order and this motion was also denied. [App. 132-133]

POINT I

PRELIMINARY RELIEF IS NECESSARY TO PREVENT
FURTHER DEPRIVATION OF DETAINEES'
CONSTITUTIONAL RIGHT TO RECEIVE CONTACT
VISITS FROM FRIENDS AND FAMILY MEMBERS

A party seeking a preliminary injunction must establish "either a combination of probable success on the merits and the possibility of irreparable injury or that they [have] raised serious questions going to the merits and that the balance of hardships tipped sharply in their favor." Stark v. New York Stock Exchange, Inc., 466 F.2d 743, 744 (2d Cir. 1972). Accord, Pride v. Community School Board, 482 F.2d 257, 264 (2d Cir. 1973); Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). Under either of these alternate tests, plaintiffs are entitled to the requested preliminary relief.

Whether a preliminary injunction should be granted is within the discretion of the trial court and reversal of the lower court's decision requires a showing of abuse of discretion.* New York Pathological and X-Ray Laboratories, Inc. v. Immigration and Naturalization Service, 523 F.2d 79, 81 (2d Cir. 1975). However, as stated by Judge Friendly in Omega Importing Corp. v. Petri - Kine Camera Company, 451 F.2d 1190, 1197 (2d

*For a discussion of the standard of review concerning factual disputes see page 19, *infra*.

Cir. 1971):

"..... we recognize the frequent statements that the discretion of a district judge in refusing or granting a temporary injunction will generally be respected But Congress would scarcely have made orders granting or refusing temporary injunctions an exception to the general requirement of finality as a condition to appealability, 28 U.S.C. §1292(a) (1), if it intended appellate courts to be mere rubberstamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason."

In the instant case, the District Court, at best, abused its discretion. Alternatively, the District Court made a clear mistake of law in denying the request for preliminary relief.

414 Theater Corp. v. Murphy, 499 F.2d 1155, 1159 (2d Cir. 1974).

See discussion, infra, at pgs. 6-10.

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A. There is a substantial likelihood that plaintiffs will succeed on the merits of their claim

The rights of pre-trial detainees have been thoroughly delineated in numerous decisions of this Court directing changes in conditions at county jails.¹ The starting point for these decisions is a recognition that pre-trial detainees are individuals who, "but for their inability to furnish bail, would remain at liberty, enjoying all the rights of free citizens until and unless convicted." Rhem v. Malcolm (I), 371 F.Supp. 594, 622 (S.D.N.Y. 1974), aff'd, 507 F.2d 333 (2d Cir. 1974). It is now beyond dispute that "pretrial detainees are people, not outcasts, who are presumed to be innocent of any crime and who have rights guaranteed by the Constitution, as do we all." Rhem v. Malcolm (I), 507 F.2d at 342. Accordingly, as this Court said:

"In providing for their [pretrial detainees'] detention, correctional institutions must be more than mere depositories for human baggage and any deprivations or restrictions of the detainees' rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity."

Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975).

¹ See, e.g., Rhem v. Malcolm (II), 527 F.2d 1041 (2d Cir. 1975); Detainees of the Brooklyn House of Detention v. Malcolm, 520 F.2d 392 (2d Cir. 1975); Rhem v. Malcolm (I), 507 F.2d 333 (2d Cir. 1974), affirming, 371 F.Supp. 594 (S.D.N.Y. 1974)

See also, United States ex rel Wolfish v. Levi, 406 F.Supp. 1243, 1247 (S.D.N.Y. 1976); Forts v. Malcolm, 426 F.Supp. 464 (S.D.N.Y. 1977).

One of the detainees' rights which is firmly established in this jurisdiction is the right to receive contact visits. Rhem v. Malcolm (II), 527 F.2d 1041 (2d Cir. 1975) (contact visits ordered at Rikers Island House of Detention); Rhem v. Malcolm (I), supra (contact visits ordered at Manhattan House of Detention); Detainees of the Brooklyn House of Detention v. Malcolm, 421 F.Supp. 832 (S.D.N.Y. 1976) (73 Civ. 261) (contact visits ordered at Brooklyn House of Detention); Ambrose v. Malcolm, ____ F.Supp. ____ (S.D.N.Y. 1976) (76 Civ. 190) (contact visits ordered at Bronx House of Detention)*; Manicone v. Cleary, ____ F.Supp. ____ (E.D.N.Y. 1975) (74 Civ. 575) (Slip Op. at 30) (contact visits ordered at Suffolk County Jail). In Rhem v. Malcolm (II), supra, the district court entered a preliminary injunction directing the Rikers Island House of Detention to provide contact visits for all detainees. This Court affirmed the grant of preliminary relief and, in so doing, laid to rest any notion that jail administrators can deny detainees their right to contact visits with friends and family members. The Court said:

"... in granting the relief on February 20, 1975, the district court was not writing on a clean slate. Judge Lasker's order

*A copy of this unreported decision is attached as Appendix "A" to this Brief.

requiring the abolition of non-contact booth visits at HDM, subject to the legitimate dictates of institutional security, merely reflected the fact that such visits previously had been held to be an unconstitutional practice, 371 F. Supp. at 625, aff'd, 507 F.2d at 338-39, and one that already has been discontinued by most penal authorities. An unconstitutional booth is no less objectionable because it's on Rikers Island rather than in the Tombs.

Rhem v. Malcolm (II), 527 F.2d at 1043.

Recently, the district court in Ambrose v. Malcolm, supra, pg. 3, reviewed the cases in this jurisdiction and concluded that "the Court of Appeals' affirmances of the decisions of this court have established as the law of this circuit that while security considerations must be taken into account in determining the scope and implementation of a contact visiting program, they may not act as a bar to that right." There, the court granted plaintiffs' motion for preliminary relief and directed defendants to submit a plan within thirty days for the initiation of contact visits at the Bronx House of Detention.

Similarly, in Detainees of the Brooklyn House of Detention for Men v. Malcolm, supra, plaintiffs sought injunctive relief enjoining defendants from denying detainees their right to a contact visitation program. Judge Bramwell examined the Second Circuit decisions and held that as a matter of law the denial of

contact visitation at BHD is unconstitutional and must be promptly rectified. Accordingly, the court granted the detainees' motion for summary judgment and directed the jail administrators to submit a plan for initiation of a contact visitation program. Detainees, supra, at 836.

In these circumstances, defendants cannot seriously dispute the fact that plaintiffs and other pre-trial detainees have a constitutional right to receive contact visits from family members and friends. Indeed, the county sheriffs in New York were instructed by the Commission of Correction that

"Many courts, including the Second Circuit Court of Appeals, whose jurisdiction includes New York State, have held, after hearing testimony from all concerned (e.g., administrators, corrections experts and prisoners), that contact visitation is a minimal constitutional requirement in local correctional facilities (see Rhem, supra). Contact visitation is now permitted in many jurisdictions including the New York State prison system, the Federal prison system and various local facilities in New York State." (See Complaint at ¶20) [App. 12] (emphasis added).

Despite full knowledge that contact visits are constitutionally mandated, the public officials responsible for administration of the county jails which are the subject of this lawsuit continue to refuse to ensure the initiation and continued operation of contact visitation programs. The

non-contact visiting procedures at these institutions certainly are no less objectionable than those at the jails in Manhattan, Rikers Island, Brooklyn, Bronx and Suffolk County. Accordingly, here - as in Rhem (I), Rhem (II), Detainees of Brooklyn House of Detention, Ambrose, and Manicone - defendant Lombard and the other members of the class should be enjoined from denying contact visits and directed to submit a plan for the initiation of contact visitation programs.

B. Plaintiffs and other pre-trial detainees will continue to be subjected to irreparable injury.

It is manifest that, absent interim relief, plaintiffs and other pre-trial detainees will continue to be subjected to serious, ongoing injury. The present non-contact visiting procedures are demeaning, dehumanizing and plainly inconsistent with the detainees' status as innocent persons. Dr. Karl Menninger, who has studied prison conditions over his lifetime has said that he:

"deplored non-contact visits as 'the most unpleasant and most disturbing detail in the whole prison,' and described them as a 'violation of ordinary principles of humanity.'" Rhem v. Malcolm (I), 371 F.Supp. at 602.

As this court has observed, "(f)ailure to provide for contact visits eliminates altogether any chance 'to shake hands with a friend, to kiss a wife, or to fondle a child'..." Rhem v. Malcolm (I), 507 F.2d at 337. Further, this Court has expressly held that preliminary relief is both necessary and proper to ensure that pre-trial detainees are provided their constitutional right to contact visits. Rhem v. Malcolm (II), 527 F.2d at 1043.

It should be noted that in reaching its determination, this court rejected any suggestion that preliminary relief should be withheld because of the possible financial burdens it would place on jail administrators. In Rhem (II), defendants urged that a

preliminary injunction directing contact visitation programs entails enormous expenditures of funds. However, this court was not persuaded that such financial considerations should bar preliminary relief:

"We are not unaware of the financial difficulties presently confronting the city defendants. But the need to bear this particular financial burden hardly comes as a surprise to the penal authorities, who have been fighting losing battles in this litigation for almost five years. More importantly, an individual's constitutional rights may not be sacrificed on the ground that the city has other and more pressing priorities. See *Rhem v. Malcolm*, 507 F.2d at 341-42; *Detainees of Brooklyn House of Detention v. Malcolm*, 520 F.2d 392, 399 (2d Cir. 1975). To do so would be to discriminate grievously against poor persons who cannot afford bail. Presumed innocent in the eyes of the law, they are incarcerated solely to insure their appearance at subsequent proceedings. This limited deprivation of their liberty cannot be extended to justify the denial of other unrelated rights for budgetary reasons. See *Shapiro v. Thompson*, 394 U.S. 618, 633, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969). Denial of the presumptively innocent detainee's constitutional rights represents an impermissible price to pay for his retention in custody. (footnotes omitted)

Rhem v. Malcolm (II), 527 F.2d at 1043-44.

As this court has previously held in a case involving pre-trial detainees, "[i]nadequate resources or finances can

never be an excuse for depriving detainees of their constitutional rights...." Detainees of Brooklyn House of Detention v. Malcolm, 520 F.2d at 399. Moreover, custodians of pre-trial detainees have been forewarned that while a federal court cannot direct authorities to raise the necessary funds, it can "order the release of persons held under conditions which deprive them of rights guaranteed by the Constitution unless the conditions are corrected within a reasonable time." Id.

Relying on these decisions, Judge Lasker recently entered preliminary relief on a contact visitation claim despite the financial burden placed on the defendant-jail administrators. In so doing, the court said:

"Defendants repeat another argument made when the Benjamin plaintiffs moved for a preliminary injunction on the issue, among others, of contact visiting: that to grant the injunction would constitute an unjustifiable grant of final relief entailing enormous expenditures of capital. We stated in our memorandum of July 11, 1975:

'Ordinarily such an argument would carry great weight, but in view of the historical background this is not an ordinary case. The plaintiffs point out that the record in Rhem v. Malcolm, including the affirmance by the Court of Appeals, establishes an overwhelming likelihood of success on the merits in the present case, and that any delay

in according plaintiffs
their constitutional rights
would be unjust.'

That statement carried even greater
weight given the Court of Appeals'
affirmance of the grant of preliminary
relief on the issue of contact
visiting at HDM."

Ambrose v. Malcolm, supra, at 2-3.

Here, too, it should be concluded that any balance of
hardships clearly tips in favor of granting the preliminary relief.
Plaintiff Dillman noted that the non-contact visits are

"frustrating, degrading and humiliating
[and] [h]e has become depressed and
despondent about his inability to
physically touch his family members.
He feels like a dead person trapped in
a coffin at the jail because during
visits at the jail he is unable to
reach out and touch the human beings
who are emotionally important to him.
The impersonal atmosphere in the
visiting area makes visitation closer
to a long distance phone call than a
personal encounter."
(Affidavit of John Dillman, sworn to
November 23, 1976 at ¶3-4) [App.
40-41].

Absent the requested relief, plaintiffs and other presumptively
innocent pre-trial detainees will continue to be stripped of their
dignity and denied one of the "common forms of human communication,"⁵
namely, contact visits.

⁵
Detainees of Brooklyn House of Detention v. Malcolm, 421 F.Supp.
832, 835 (S.D.N.Y. 1976).

POINT II

DISPUTED FACTUAL ISSUES RAISED
ON A PRELIMINARY INJUNCTION
MOTION SHOULD NOT BE RESOLVED
WITHOUT THE HOLDING OF A FACT
FINDING HEARING

A. Preliminary Injunction

It is firmly established that, where there are disputed factual issues, the district court should conduct an evidentiary hearing before deciding a preliminary injunction motion. S.E.C. v. Frank, 388 F.2d 486, 490-91 (2d Cir. 1968); Sims v. Greene, 161 F.2d 87 (3d Cir. 1947). As the court stated in Sims, "If witnesses are not heard the trial court will be left in the position of preferring one piece of paper to another." Id. at 88. This court has held that such a result is particularly inappropriate where there is a sharp dispute as to the underlying facts. S.E.C. v. Frank, supra at 491.

Here, plaintiffs maintained that, as a matter of law, they are entitled to receive contact visits notwithstanding the fact that they are confined in jails outside New York City.* Alternatively, plaintiffs urged that an evidentiary hearing should be held if the court concludes that factual issues are relevant to disposition of the preliminary injunction motion. [App. 114].

* Detainees of B.H.D. v. Malcolm, 421 F. Supp. 832, 833 (S.D.N.Y. 1976) as a matter of law, the denial of contact visitation is unconstitutional and must be promptly rectified).

In its decision, dated June 21, 1977, the District Court determined that factual issues were relevant but, despite plaintiffs' request, resolved those issues without conducting an evidentiary hearing. Indeed, the court based its findings of fact on statements in defendant's brief -- statements which are not supported by any verified pleadings or affidavits. See, Macklin v. Butler, 553 F.2d 525, 528 n.1 (7th Cir. 1977) (In ruling on summary judgment motion, court may not rely on factual assertions which appear in a memorandum rather than a verified affidavit).*

A hearing would reveal, contrary to defendant's suggestions, that differences in the physical structure and location of various county jails do not justify continued denial of contact visits. Adam F. McQuillan, President of the Correctional Association of New York and an experienced corrections officer and warden, states in his affidavit that

"despite differences in the physical structure, location, and capacity of various county jails the impact of a policy denying contact visitation is uniform. Inmates who are prohibited from having any opportunity to touch their visitors become frustrated and increasingly isolated from the community. The detrimental impact of non-contact visitation is well documented and is the same for inmates housed in jails in rural and metropolitan areas." [App. 108]

*Indeed Plaintiff moved, pursuant to Rule 59(e), for an order vacating the denial of preliminary relief and an order setting up an immediate hearing on the motion. This motion was also denied. [App. 132, 133].

Moreover, Mr. McQuillan expressly rejected the notion that contact visits would create greater security problems in rural or smaller metropolitan areas. He states that

"the implementation of contact visitation would pose no greater security threat in a rural or smaller metropolitan area than it did in New York City. That in fact the Commissioner of Correction for New York City initially took the position that contact visitation in the metropolitan area of New York City was more dangerous than the contact visits which were permitted in rural upstate New York prisons. However, the present position of the New York City jail system is to provide contact visitation, and experience has shown that there are no current programs. Additionally, there is no valid distinction between urban and smaller metropolitan or rural area jails relative to the question of whether the implementation of contact visitation would be more or less likely to secure an inmate's appearance at trial." Id. at ¶6.

Based on these verified statements, this Court should either reject these unsubstantiated assertions and plaintiffs the relief sought or remand in order to have the District Court schedule a hearing to resolve the factual dispute. The evidence presented at such a hearing would support plaintiffs' contention that a non-contact visiting booth is no less objectionable because it sits in Monroe County rather than Rikers Island. See Rhem v. Malcolm (II), 527 F.2d 1041, 1043 (2d Cir. 1975). Such a hearing also would enable the District Court to properly balance the hardships to the various parties. Detainees and experts would testify about the devastating, dehuman-

izing impact of non-contact visiting procedures. [App. 40, 41, 107-109]. Additionally, testimony could be offered regarding the relatively insubstantial cost of the requested preliminary relief. Without the benefit of a hearing and cross-examination of witnesses, the court found that the preliminary injunction would involve an expenditure of \$750,000. However, further examination would reveal that this represents defendant's estimate of the cost of full implementation of contact visitation programs. As a preliminary matter, plaintiffs are not requesting full implementation, but rather are seeking to compel defendants to submit plans for the eventual initiation of contact visitation programs. The record contains no evidence whatsoever which supports the finding that preparation of such plans would impose a financial burden on defendant Lombard or any other member of the defendant class.*

In these circumstances, plaintiffs submit that this Court should reverse the District Court order denying preliminary relief and either order the District Court to hold an evidentiary hearing or this Court should rule as a matter of law that plaintiffs are entitled to the relief sought in

*Of course, plaintiffs continue to maintain that, as a matter of law, "[i]nadequate resources or finances can never be an excuse for depriving detainees of their constitutional rights" Detainees v. Malcolm, 520 F. 2d 392, 399 (2d Cir. 1975).

the Court below.*

*Where, as here, the District Court failed to hold a hearing, this Court is "...in as good a position as the District judge to read and interpret the pleadings, affidavits..." Dopp v. Franklin National Bank, 461 F.2d 873, 879 (2nd Cir. 1972).

POINT III

CERTIFICATION OF A DEFENDANT CLASS
IS NECESSARY AND PROPER FOR
EFFICIENT RESOLUTION OF THIS ACTION

Federal Rule 23 permits certification of defendant, as well as plaintiff, classes and explicitly provides that "[O]ne or more members of a class may sue or be sued as representative parties..." (emphasis added). Courts have readily certified defendant class actions where, as here, injunctive relief is necessary to prevent public officials from perpetuating an unconstitutional rule or practice. See, e.g., Washington v. Lee, 390 U.S. 333 (1968), affirming, 263 F. Supp. 327 (M.D. Ala.); Redhail v. Zablocki, 418 F. Supp. 1061 (E.D. Wis. 1976); Ananiz v. California Processors Inc., 73 F.R.D. 269, 276 (N.D. Calif. 1976); Autry v. Miller, 420 F. Supp. 967 (E.D.N.C. 1976); Kidd v. Schmidt, 399 F. Supp. 301, 305 (E.D. Wis. 1975); Pennsylvania Assn. of Retarded Children v. Commonwealth of Pa., 334 F. Supp. 1257 (E.D. Pa. 1972), supplemented by, 343 F. Supp. 279, 291-92 (E.D. Pa. 1972); Stewart v. Miller, 404 F. Supp. 206 (N.D. Misc. 1975); Danforth v. Christian, 351 F. Supp. 287, 289 (W.D. Mo. 1972), aff'd 506 F.2d 1115 (8th Cir. 1974); Samuel v. Univ. of Pittsburgh, 54 F.R.D. 435, 437, 440 (W.D. Pa. 1972); Rikes v. Coleman, 318 F.

Supp. 181, 190 (E.D. Va. 1970).*

*As one commentator has said:

The sanctions which are presently employed against public officials have not proved effective in securing their compliance to judicial decisions which pertain to their authority and practices. The sheer number of these officials and the fact that they are not directly subject to a common authority have made effective and meaningful enforcement of judgments against them difficult, if not impossible. The procedural device of a defendant class is an ideal method to fill gaps left by the existing set of remedies. Maintenance of a defendant class facilitates efficient judicial administration by eliminating repetitious and frequently needless litigation. Note: Defendant Class Actions, 9 Valparaiso L. Rev. 357, 419 (1975) (hereinafter cited as Defendant Class Actions); See also, Class Actions, Newberg, H., Vol. 5, §8776, pg. 751 (1977).

Additional benefits which flow from class actions include: avoidance of a multiplicity of lawsuits through the elimination of repetitious litigation, elimination of the risk of inconsistent adjudications, and provision of meaningful tools with which to obtain compliance. The problems with repetitious litigation are particularly germane in the instant action. Despite this Court's previous decisions on the issue of contact visitation and the value of stare decisis, pre-trial detainees in about forty (40) jails in New York are continuously being denied their constitutional rights to provide visits.

In Washington v. Lee, supra, plaintiffs sought declaratory and injunctive relief restraining racial segregation of prisoners in state correctional institutions and local jails. Plaintiffs sued the sheriffs and wardens of the institutions in which they were confined and requested certification of a defendant class consisting of all other sheriffs and wardens in Alabama. A three-judge district court held that certification of a defendant class was necessary and proper under Rule 23. 263 F. Supp. at 220-31. The Supreme Court affirmed and, in so doing, held that defendants' "contentions that Rule 23 of the Federal Rules of Civil Procedure, which relates to class actions, was violated in this case...are without merit." 390 U.S. 333.

Here, as in Washington, plaintiffs seek certification of a defendant class and have sued defendant Lombard as a representative of the class which includes all county sheriffs who are responsible for the care and custody of pre-trial detainees in jails which do not provide contact visitation programs and which have not been the focus of another lawsuit requesting contact visits. This lawsuit meets all the requirements for certification of a defendant class.

NUMEROSITY:

First, the defendant class includes at least forty (40) sheriffs who refuse to provide contact visitation programs for pre-trial detainees.* Joinder of all such sheriffs is impracticable. United States ex rel Walker v. Mancusi, 338 F. Supp. 371 (W.D.N.Y. 1971), aff'd on other grounds, 467 F.2d 51 (1972). (Joinder of 38 persons is impracticable).**

COMMONALITY:

Second, there is an issue of law common to all members of the defendant class - namely, the constitutionality of the sheriffs' failure to initiate and ensure the continued opera-

*Affidavit of Daan Braveman, Esq., sworn to November 23, 1976 [App. 28-34]. However, it is well settled that failure to state the exact size of the class does not preclude certification of a class action. See, e.g., Kohn v. Royall, Koegel and Wells, 59 F.R.D. 515 (S.D.N.Y. 1973), appeal dismissed, 496 F.2d 1094 (2nd Cir. 1974); Siegel v. Realty Equities Corporation of New York, 54 F.R.D. 420, 424 (S.D.N.Y. 1972); Sero v. Oswald, 351 F. Supp. 522, 528 (S.D.N.Y. 1972); Doglow v. Anderson, 43 F.R.D. 472, 492 (E.D.N.Y. 1968) rev'd on other grounds, 438 F.2d 825 (2nd Cir. 1970).

**See also King v. Carey, 405 F. Supp. 41, 44 (W.D.N.Y. 1975) (80 members of plaintiff class); Union Pacific R.R. Co. v. Wooddahl, 308 F. Supp. 1002, 1005 (N.D. Montana, 1970) (57 County attorneys in a defendant's class makes joinder impracticable); Samuel v. University of Pittsburgh, 56 F.R.D. 435, 439 (W.D. Pa. 1972). (Forty-eight defendants meet the numerosity requirement).

tion of contact visitation programs for detainees at county jails.* Equally clear is the fact that the claims and defenses of defendant Lombard are not in any way antagonistic to, or in conflict with, the claims and defenses of other members of the defendant class. Defendant's various arguments, which were erroneously adopted by the District Court in ruling against class certification, are premised upon the faulty notion that factual differences among the jails preclude class designation. In advancing this notion, defendant simply ignores the decision in Washington v. Lee, 263 F. Supp. 327 (M.D. Ala.), aff'd 390 U.S. 333 (1968). There, plaintiffs moved for certification of a defendant class consisting of the sheriffs and wardens of all correctional institutions and jails in Alabama. Defendants opposed the class action motion on the very grounds now being advanced by defendant Lombard - namely, the physical characteristics of each institution are unique. 263 F. Supp. at 330. The district court rejected such an argument and stated:

*Sheriffs in New York State are given the constitutional and statutory responsibility to have "care and custody" of pre-trial detainees. N.Y. Constitution, Article 13, Section 13, Correction Law §500-c.

"While it may be that the physical facilities of Jefferson County and the City of Birmingham are more elaborate and their operations more complex than many of the other jails in Alabama, this, without more, cannot serve to nullify the operation of that portion of the class action rule that authorizes representative defendants. See Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9th Cir. 1964). See also Potts v. Flax, 313 F.2d 284 (5th Cir. 1963); Sims v. Frink, 208 F. Supp. 431 (M.D. Ala. 1962). It would be extremely difficult, if not impossible, to find members of a class to serve as representative defendants in a case, such as this one, where there are not some material differences in the physical facilities and operations involved. But since the rule requires only that there be questions of law and fact common to these defendants and the members of the class which they represent - a requirement which, as indicated, is satisfied in this case - then it becomes immaterial whether certain of these class defendants are not otherwise situated.

Id. at 330-31. That determination was affirmed by the Supreme Court, 390 U.S. 323 (1968), and is controlling in the instant case. See also, Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (factual matters relating to each class member need not be identical).

Defendant's attempt to defeat the class motion on the basis of purported factual matters is equally indefensible in light of the recent decisions holding that pre-trial detainees have a constitutional right to receive contact visits. Rhem v.

Malcolm (II), supra; Rhem v. Malcolm (I), supra; Detainees of Brooklyn House of Detention v. Malcolm, 421 F. Supp. 832 (S.D. N.Y. 1976); Ambrose v. Malcolm, ____ F. Supp. ____ (S.D.N.Y. 1976) (76 Civ. 190); Manicone v. Cleary, ____ F. Supp. ____ (E.D.N.Y. 1975) (74 Civ. 575). the District Court found that there were factual differences between the Monroe County Jail and the New York City institutions affected by this Court's prior holdings. [District Court opinion, at pg. 6, App. 102]. This finding by the District Court is unsupported and plainly incorrect. Neither the District Court nor the defendant cite a single authority in support of this assertion. Additionally the acceptance of this premise by the District Court was made without the holding of an adversial hearing. The only relevant affidavit before the District indicated that there were no germane factual differences between county jails in New York State [App. 107-109]. Accordingly, contrary to defendant's suggestions, class certification is necessary and proper to resolve a common question of law - whether plaintiffs and other pre-trial detainees have a constitutional right to receive contact visits while confined in local jails.*

*Indeed, in Rhem v. Malcolm (II), 527 F.2d at 1043, this court rejected the identical assertion and stated, "We find no merit in appellants' initial contention that the court erred in ordering [the House of Detention for Men] to provide contact visits without first holding a full hearing on the physical and financial difficulties posed by such an order." In Detainees of the Brooklyn House of Detention v. Malcolm, supra, Judge Lasker, after reviewing the recent decisions on contact visitation, concluded that while physical and security considerations "must be taken into account in determining the scope and implementation of a contact visiting program, they may not act as a bar to that right." (Slip Op. at 4).

TYPICALITY AND ADEQUACY OF REPRESENTATION:

Federal Rule 23(a)(3) provides that "[the claims or defenses of the 'representative party) are typical of the claims or de of the class." This provision clearly contemplates cilization of defendant class actions. In this lawsuit plaintiffs claim a constitutional right to contact visits. Defendant Lombard as a representative of other sheriffs who have denied contact visits need not have identical interests with other sheriffs but need only have coextensive interests. Koehler v. Ogilive, 53 F.R.D. 98 (N.D. Ill. 1971), aff'd, 405 U.S. 906 (1971). See also, Sosna v. Iowa, 419 U.S. 393, 95 Sup. Ct. 553, 559 n.13 (1975). Clearly the defenses presented by defendant Lombard are typical in the sense that they represent an expression of the interest of sheriffs who maintain jails for pre-trial detainees in New York State. Thus, this Court should find that plaintiffs have met their burden of showing typicality in their motion for a defendant's class, and hold that the District Court erred in denying that motion. See, Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 24 (2nd Cir. 1974); Kaplan, Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 387 n.120 (1967).

Defendant Lombard has refused to permit contact visits for detainees and accordingly, has a stake in this proceeding

which makes him an adequate representative of the other members of the class.* U.S. v. Trucking Employers Inc., 72 F.R.D. 101, 106. (D.D.C. 1976).

RULE 23(b):

In these circumstances, the prerequisites of Rule 23(a) are satisfied and this action may be maintained as a defendant class action if one or more of the provisions of Rule 23(b), are also met. Here, the requirements of subsections (b)(1)(B) and (b)(2) are fulfilled.

Rule 23(b)(1)(B) provides that a class action may be certified if

"the prosecution of separate actions by or against individual members of the class would create a risk of...

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests..."

In the instant action a decision that the named defendants must

*The Court in Gibbs v. Titelman, 369 F. Supp. 38, 52-53, (E.D. Pa., 1973), rev'd on other grounds, 502 F.2d 1107 (3rd Cir., 1974) cert. denied 419 U.S. 1039 (1974), held that the language of Federal Rule 23(b)(2) which requires that the "party opposing the class has acted or refused to act on grounds generally applicable to the class..." does not preclude the creation of a defendant's class. This finding is supportive, where as here, defendants are acting under authority of state law in a way which violates the rights of the plaintiff class as a whole.

Additionally, the alleged reluctance of Defendant Lombard to act as a representative of the defendant class is irrelevant. Thompson v. Board of Education, 71 F.R.D. 398, 407 n.13 (W.D. Mich. 1976).

provide contact visitation programs would directly affect the rights of the other sheriffs in the defendant class. Indeed, a permanent injunction directing the members of the New York State Commission of Correction, the other defendants in this action, to develop a plan which will ensure the initiation and continued operation of contact visitation programs at county jails will necessarily affect the interests of the sheriffs who administer those institutions. Plainly, certification of the defendant class is proper under Rule 23(b)(1)(B). Defendant Class Actions, supra, at 396-406.

So too, the requested defendant class properly may be certified pursuant to Rule 23(b)(2). By requesting declaratory and injunctive relief for all pre-trial detainees, plaintiffs are acting on grounds generally applicable to the forty (40) sheriffs who are members of the defendant class.

Plaintiffs submit that a class action is the proper mechanism for challenging defendants' refusal to provide contact visits. Indeed, all parties will be adversely affected if this court affirms the denial of the motion for class certification. Other pre-trial detainees will be forced to suffer the expense of either intervening in this action or instituting separate actions. Defendants will be forced to bear the burden of defending numerous independent actions. Finally, the various District Courts will be faced with the inconvenience of trying at least

forty separate lawsuits involving the identical issue. In such circumstances, an order certifying a defendant class is necessary and proper for the efficient resolution of the claims raised in the complaint.

Additionally, plaintiffs complain that relying on statements in defendant's brief, the District Court concluded that defendant Lombard is not a proper representative of a defendant class consisting of all sheriffs who continue to deny detainees the right to receive contact visits. Having determined that various factual matters are relevant to the class certification motion, the District Court should not have denied the motion on the basis of unverified statements in a brief, but rather should conduct an evidentiary hearing. See Huff v. N.D. Cass Company, 485 F.2d 710, 713 (5th Cir. 1973) (en banc). Thus, for the reasons set forth above this Court should reverse the determination of the District Court and remand this matter for certification of a defendant's class.

POINT IV

THIS COURT HAS JURISDICTION TO REVIEW
THE DISTRICT COURT'S ORDER DENYING
CLASS CERTIFICATION WITH PRELIMINARY
RELIEF

As a general rule, an order denying class action certification is not a "final order" which may be appealed as a right under 28 U.S.C. §1291, Cobbledick v. United States, 309 U.S. 323 (1940). Nor is it usually considered an interlocutory order of the kind from which an immediate appeal may be taken. Eisen v. Carlisle and Jacquelin (Eisen I), 370 F.2d 119, 120 (2nd Cir. 1966), cert. denied, 386 U.S. 1035 (1967); Jones v. Diamond, 519 F.2d 1090, 1095 (5th Cir. 1975). However, federal appellate courts have developed exceptions to the general rules.

A. Appealability under 28 U.S.C. §1292(a)(1)

Plaintiffs allege that they, as pre-trial detainees, are being deprived of their constitutional right to contact visitation. Their complaint contends that large numbers of pre-trial detainees are being housed in jails throughout New York State which deny what this Court has held to be a clear constitutional right.¹ Plaintiffs sought certification of both plaintiff and

¹ See Point I, supra.

defendant classes as well as a preliminary injunction directing members of defendant class to submit plans for eventual initiation of contact visitation programs.

The District Court denied plaintiffs' motion for certification of a defendant class, but failed to rule on the request for certification of a plaintiff class. The effect of the District Court's action is to narrow the scope of the relief available to plaintiffs to the confines of the Monroe County Jail.² The District Court, in effect, has refused to grant the injunctive relief sought by plaintiffs, thus giving this court appellate jurisdiction under 28 U.S.C. §1292(a)(1). Many Circuit Courts have held that appellate jurisdiction is proper where "...the substantial effect [of the class order] is to narrow considerably the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits." Yaffe v. Powers, 454 F.2d 1362, 1364 (1st Cir., 1972); Accord, BUILD of Buffalo v. Sedita, 441 F.2d 284 (2d Cir. 1971); Jones v. Diamond, 519 F.2d 1090, 1095-97 (9th Cir., 1975); Price v. Lucky Stores, 501 F.2d 1177 (9th Cir. 1974); Brunson Board of Trustees of School District No. 1 of Clarendon County South Carolina, 311 F.2d 107 (4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); Hackett v. General Hcst Corporation, 455 F.2d 618

² Concomitantly the denial of a defendant's class logically narrows any potential plaintiff class to pre-trial detainees of the Monroe County Jail.

(3rd Cir. 1972), cert. denied 407 U.S. 925 (1972); Inmates of San Diego County Jail v. Duffy, 528 F.2d 954, 956 (9th Cir. 1975).

This Court in Williams v. Wallace Silversmiths Inc., ____ F.2d ____ (2nd Cir., March 4, 1977) set forth the standards to be used in assessing the appealability of an order denying class certification. While the Court in Williams found the order involved there was not appealable, it held that denial of class designation is appealable under 28 U.S.C. §1292(a)(1) so long as the following criteria are satisfied: (1) Preliminary relief was requested and such relief is the heart of the case; (2) the striking of class allegations was based on a view of the merits of plaintiffs' case; and (3) the scope of the ultimate relief was contracted to the extent of effectively "denying" the relief sought by plaintiffs.

In the instant case, plaintiffs moved for class certification as an essential part of their case for preliminary relief. Class certification was rejected, in part, because of the District Court's erroneous view on the need for naming County legislators as party's defendant and because there were allegedly differences between county jails. Most importantly, the denial of a defendant class has the practical effect of totally foreclosing any relief against the unnamed members of

the defendant class of New York State Sheriffs. Accordingly, this Court should find that the denial of the class certification motion here is appealable under 28 U.S.C. §1292(a)(1) and the standard adapted in Williams.

- B. Since this court has jurisdiction to review a denial of preliminary relief it may also review the district courts class order.

This Court clearly has jurisdiction over plaintiffs' appeal from the order denying their motion for a preliminary injunction. 28 U.S.C. §1292(a)(1), Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2nd Cir. 1966) cert. denied, 385 U.S. 971 (1967). The rule in this Circuit is that an appeal from an order which is properly before a federal appellate court supports review of the entire order even if portions of the order may not be appealable standing alone.* San Filippo v. United Brotherhood of Carpenters and Joiners of America, 525 F.2d 508, 512-513 (2nd Cir. 1975); Jenkins v. Blue Cross Mutual Hospital Association, Inc., 522 F.2d 1235 (7th Cir. 1975); Zwack v. Krans Brothers and Co., 237 F.2d 255, 261 (2nd Cir. 1956); Sullivan v. Title Guarantee, 167 F.2d 393, 396 (2nd Cir. 1948). See also, Genosick v. Richmond Unified School District, 479 F.2d 482 (9th Cir. 1973). Thus, this Court has jurisdiction to hear the appeal from the denial of certification of a defendant class. Compare, City of New York v. International Pipe and Ceramics Corp., 410 F.2d 295 (2nd Cir. 1969) (Appeal not allowed because District Court

*Plaintiffs do not concede that the denial of their class action certification motion is not appealable. See Point IV-A, supra.

had not reached the questions of injunctive relief).

As this Court said in Korn v. Franchard Corp., 443 F.2d 1301, 1306 (2nd Cir. 1971) when commenting about appealability of class orders:

"...many class suit requests will arise in a context in which preliminary injunctive relief may frequently be sought, e.g., civil rights or welfare cases. In such instances, an early appeal from the substantive ruling on the appropriateness of preliminary relief is available, at which time the appellate court may well choose to review the class suit ruling as well. [Citations omitted]

Thus, this Court should hold, as did the Ninth Circuit in Inmates of the San Diego County Jail v. Duffy, 528 F.2d 954, 956 (9th Cir. 1975), that the combined denial of motions for preliminary injunction and class certification provide the Court of Appeals with appellate jurisdiction.

CONCLUSION

For the reasons set forth in the points and authorities in this brief, plaintiffs urge this Court to reverse the District Court and grant the preliminary relief and class certification sought by plaintiffs. Alternatively, plaintiffs urge this Court to reverse the District Court and remand for the holding of a hearing on plaintiffs motions. Finally, plaintiffs respectfully request that on remand this case be sent to the Chief Judge of the Western District of New York for reassignment to another judge. U.S. v. Robin, 553 F.2d 8, 10 (2nd Cir. 1977) (Doc. No. 76-1033).

Respectfully submitted,

DAVID W. BEIER II, ESQ., Of Counsel
DAAN BRAVEMAN, ESQ., Of Counsel
MONROE COUNTY LEGAL ASSISTANCE
CORPORATION
80 West Main Street
Rochester, New York 14614
Tel. No. (716) 325-2520
Attorneys for Plaintiffs-Appellants

Dated: September 14, 1977
Rochester, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CITY ZEPH AMBROSE, LUIS GILLES, FRANK
ABDUL CHANT and JOHNNY JOHNSON,
detainees of the Bronx House of
Detention for Men, individually and
on behalf of all other persons
similarly situated,

76 Civ. 190

Plaintiffs,

-against-

MEMORANDUM

BENJAMIN J. MALCOLM, Commissioner of
Correction of the City of New York;
ROBERT KIRTON, Deputy Warden-in-
Command, Bronx House of Detention for
Men; and ABRAHAM D. BEAME, Mayor of the
City of New York, individually and in
their official capacities,

Defendants.

-----X
APPEARANCES:

THE LEGAL AID SOCIETY
15 Park Row - 19th Floor
New York, New York 10038
Attorneys for Plaintiffs

Of Counsel: WILLIAM E. HELLERSTEIN, ESQ.
JOEL BERGER, ESQ.
DAVID A. ENGLANDER, ESQ.
MICHAEL B. MUSHLIN, ESQ.

W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Municipal Building
New York, New York 10007
Attorney for Defendants

Of Counsel: DONALD J. TOBIAS, ESQ.

LASKER, D.J.

Plaintiffs move on behalf of the class of pre-trial detainees at the Bronx House of Detention for Men for a preliminary injunction requiring defendants to commence forthwith a program of contact visiting. Defendants oppose the motion on a variety of grounds, none of which, for the reasons set forth below, we find persuasive.

A party who seeks preliminary relief must establish either a "combination of probable success and the possibility of irreparable injury or that [it has] raised serious questions going to the merits and that the balance of hardships [tips] sharply in [its] favor." Pride v. Community School Board, 488 F.2d 321, 324 (2d Cir. 1973).

Defendants' argument that plaintiffs have not demonstrated a probability of success ignores the history of litigation in this circuit involving the rights of pre-trial detainees. In Rhem v. Malcolm, we held that detainees housed at the Manhattan House of Detention (Tombs) were constitutionally entitled to contact visits. 371 F.Supp. 595, 625 (1974). That ruling was affirmed by the Court of Appeals, 507 F.2d 333, 338-39 (1974), and again affirmed in the companion suit of Benjamin v. Malcolm, brought on behalf of detainees at the New York City House of Detention for Men at Riker's Island. 527 F.2d 1041 (1975). The fact that detainees in the Bronx may have greater opportunities to

make personal calls than do detainees at other City institutions does not at all compensate for their present inability "to shake hands with a friend, to kiss a wife, or to fondle a child." 371 F.Supp. at 627, cited at 507 F.2d at 337.

Even if the City is correct that the right to contact visiting has not been established in other jurisdictions, the law in this circuit is plain. That plaintiffs are housed in the Bronx and not Riker's Island or Manhattan is a geographical difference without constitutional significance. In rejecting defendants' earlier attempt to resist instituting contact visiting at the House of Detention for Men on Riker's Island, the Court of Appeals stated, "An unconstitutional booth is no less objectionable because it sits on Rikers Island rather than in the Tombs." Rhea v. Malcolm, Benjamin v. Malcolm, supra, 527 F.2d at 1043. Nor does it become so because it sits in the Bronx.

Defendants repeat another argument made when the Benjamin plaintiffs moved for a preliminary injunction on the issue, among others, of contact visiting: that to grant the injunction would constitute an unjustifiable grant of final relief entailing enormous expenditures of capital. We stated in our memorandum of July 11, 1975:

"Ordinarily such an argument would carry great weight, but in view of the historical background this is not an ordinary case. The plaintiffs point out that the record in Rhea v.

Malcolm, including the affirmance by the Court of Appeals, establishes an overwhelming likelihood of success on the merits in the present case, and that any delay in according plaintiffs their constitutional rights would be unjust."

That statement carries even greater weight given the Court of Appeals' affirmance of the grant of preliminary relief on the issue of contact visiting at HDM. Rhem v. Malcolm, Benjamin v. Malcolm, supra.

According to defendants, however, security considerations at the Bronx House of Detention make the institution of a contact visiting program unfeasible. They fear that the location of the institution in the center of a heavily populated area significantly increases the risks of contact visiting. Moreover, they contend that in general the type of individual who is currently incarcerated while awaiting trial presents a greater security risk than did the men who were pre-trial detainees at the time of the trial in Rhem. While a classification system could determine which inmates present unacceptable security risks and allow for contact visiting for the rest of the population, the defendants argue that the transient nature of the population prevents them from making accurate predictions necessary for such a classification system.

Throughout the course of the litigation in Rhem, Benjamin and Ambrose, we have indicated our understanding

that security considerations must be taken into account in devising a contact visiting program. Nevertheless, the Court of Appeals' affirmances of the decision of this court have established as the law of the circuit that while security considerations must be taken into account in determining the scope and implementation of a contact visiting program, they may not act as a bar to that right.

Accordingly, plaintiffs' motion for preliminary injunction is granted. The defendants are ordered within thirty days of the filing of this memorandum to submit a plan for the initiation of contact visits at the Bronx House of Detention. The plaintiffs shall have the option to file a proposed plan with the court within the same period. Either party shall have the right to submit to the court within fifteen days after the filing of a proposed plan, its comments as to such plan.

It is so ordered.

Dated: New York, New York
May 6, 1976.

MORRIS E. LASKER

U.S.D.J.

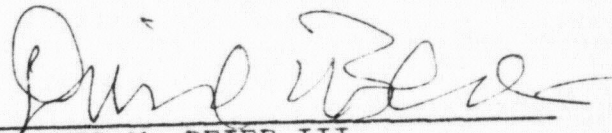
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A F F I D A V I T

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:

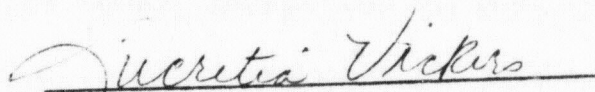
DAVID W. BEIER III, being duly sworn, deposes and says:
deponent is not a party to the action, is over 18 years of age
and resides at Rochester, New York.

On September 14, 1977 at 65 Broad Street, Rochester,
New York 14614 deponent served the within Appellant's Brief
and Appendix upon an agent for Paul O. Harrison, Esq., one of
the attorneys herein, by delivering a true copy thereof to his
agent personally.



DAVID W. BEIER III

Sworn to before me this
14th day of September, 1977.



Reg # 9463350

LUCRETIA VICKERS
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 1978